

1 The  
2 **THOMAS McKEE TARPLEY**  
3 Law Firm  
4 A Professional Corporation  
5 GCIC Building  
6 414 West Soledad Avenue, Suite 904  
7 Hagatna, Guam 96910  
8 Telephone: (671) 472-1539  
9 Facsimile: (671) 472-4526  
10 Electronic mail: tarpley@guam.net

**FILED**  
DISTRICT COURT OF GUAM

FEB 11 2008

JEANNE G. QUINATA  
Clerk of Court

2:10

11 **FORREST BOOTH** (Cal. Bar No. 74166) (Admitted *pro hac vice*)  
12 **RYAN C. DONLON** (Cal. Bar No. 229292) (Admitted *pro hac vice*)  
13 **SEVERSON & WERSON**  
14 A Professional Corporation  
15 One Embarcadero Center, Suite 2600  
16 San Francisco, CA 94111  
17 Telephone: (415) 398-3344  
18 Facsimile: (415) 956-0439  
19 Electronic mail: fb@severson.com  
20 Electronic mail: rcd@severson.com

21 Attorneys for Defendant, Cross-Claimant and  
22 Counterclaimant S.J. GARGRAVE SYNDICATE 2724  
23 9ZP505W

24 **IN THE DISTRICT COURT OF GUAM**  
25 **TERRITORY OF GUAM**

26 UNITED STATES OF AMERICA,

27 Plaintiff,

28 and

INCHCAPE SHIPPING SERVICES GUAM,  
LLC,

Plaintiff in Intervention,

vs.

MARWAN SHIPPING & TRADING CO.,  
FIVE SEAS SHIPPING CO., LLC, and S.J.  
GARGRAVE SYNDICATE 2724,  
*in personam*,

Defendants.

Case No.: 1:06-CV-00011

**S.J. GARGRAVE SYNDICATE 2724'S  
OPPOSITION TO NAVIGATORS'  
MOTION TO SET ASIDE DEFAULT  
AND DISMISS FIRST AMENDED  
THIRD-PARTY COMPLAINT AND  
REPLY BRIEF IN SUPPORT OF  
MOTION FOR DEFAULT JUDGMENT  
AGAINST NAVIGATORS INSURANCE  
CO., DBA NAVIGATORS  
PROTECTION & INDEMNITY**

Complaint Date: April 19, 2006  
Trial Date: May 12, 2008

1 AND CROSS-CLAIMS, COUNTERCLAIM,  
2 AND CLAIM IN INTERVENTION  
3  
4

5 **I. INTRODUCTION**

6 Navigators' Motion to Set Aside Default and Dismiss First Amended Third-Party  
7 Complaint of S.J. Gargrave Syndicate 2724 ("Navigators' Motion to Set Aside Default") should  
8 be denied, and S.J. Gargrave Syndicate 2724's Motion for Default Judgment Against Navigators  
9 Insurance Co., dba Navigators Protection & Indemnity ("Gargrave's Motion for Default") should  
10 be granted.

11 **II. NAVIGATORS HAS GENERALLY, NOT SPECIALLY, APPEARED**

12 Navigators, in its Motion to Set Aside Default, claims to be appearing specially in this  
13 Court. It cannot do so, for several reasons. First, there is no such thing as a special appearance in  
14 federal court; that practice was abolished with the adoption of the Federal Rules of Civil  
15 Procedure in 1937. 5B Charles Alan Wright and Arthur R. Miller, *Federal Practice and*  
16 *Procedure* ("Wright and Miller") 30 and 28-29 fn. 1. Rule 12 of the Federal Rules of Civil  
17 Procedure eliminated the distinction between general and special appearances. *Martens v.*  
18 *Winder*, 341 F.2d 197, 200 (9th Cir. 1965). "... [T]echnical distinctions between general and  
19 special appearances have been abolished and the rulemakers wisely concluded that no end is  
20 accomplished by retaining these terms in federal practice." 5B Wright and Miller, *supra*, at 30.  
21 Furthermore, Navigators has generally appeared three times before in this action. On April 3,  
22 2007, Navigators filed two motions herein for the admission of attorneys Stanley Gibson and  
23 Ellen G. Lauck *pro hac vice* in this Court, without any reference to special appearance; this Court  
24 ordered their admission on April 12, 2007. Also, Navigators, again without any reference to  
25 special appearance, filed a Rule 12(b)(6) motion on August 31, 2007 to dismiss the amended  
26 complaint in intervention of Inchcape Shipping Services (Guam) LLC ("Inchcape") for failing to  
27 state a proper claim for relief.  
28

1           **III.    GARGRAVE PROPERLY SERVED ITS AMENDED THIRD-PARTY**  
2           **COMPLAINT**

3           Inchcape's amended complaint in intervention was dismissed by the Court without  
4           prejudice. Gargrave's [original] third-party complaint against Navigators was dismissed without  
5           prejudice on February 1, 2007. The litigation brought herein by the United States is ongoing.  
6           Inchcape could refile its complaint in intervention, which counsel herein have discussed, (Booth  
7           Declaration, ¶ 10), and Gargrave had the right to, and did, refile its third-party complaint  
8           (Gargrave's First Amended Third-Party Complaint) against Navigators. Plaintiff United States  
9           could sue Navigators, which it has discussed doing. *Id.* Accordingly, it was appropriate for  
10          Mr. Gibson to retain his status as attorney *pro hac vice* for Navigators, since it was possible (and  
11          perhaps even likely) that an additional claim or claims might be filed against his client. That  
12          possibility was discussed by various counsel from time to time. *Id.*

13          Mr. Gibson has never withdrawn his request to be admitted *pro hac vice* in this action as  
14          counsel for Navigators, nor has he asked that the Court's order qualifying him as counsel *pro hac*  
15          *vice* be reversed. Accordingly, the Court's order of April 12, 2007 is still in full force and effect.

16          The two dismissals of Navigators without prejudice are both interlocutory orders of the  
17          Court. No judgment in favor of Navigators has ever been issued with regard to any claims  
18          against Navigators, pursuant to Fed.R.Civ.Pro. 54, or otherwise. Those dismissals were not  
19          appealable because they were not final (they did not dispose of the entire litigation). 15A Wright  
20          and Miller at 487. Fed.R.Civ.Pro. 54(b) makes it clear that an order or dismissal "... which  
21          adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall  
22          not terminate the action as to **any of the claims or parties**, and the order or other form of  
23          decision is subject to revision at any time before the entry of judgment ..." (emphasis added).  
24          Accordingly, the interlocutory orders of dismissal herein were not final, could be modified by the  
25          Court at any time, and the claimants could refile against Navigators. *Borelli v. City of Reading*,  
26          532 F.2d 950, 951-2 (3d Cir. 1976) (dismissal without prejudice is neither final nor appealable;  
27          plaintiff can refile). When Gargrave filed its First Amended Third-Party Complaint, Navigators  
28          had not been finally dismissed, and it and its lawyers were (and still are) before this Court.

1 Messrs. Sterling and Gibson under the Court's rules were, and still are, counsel of record  
2 for Navigators in this very lawsuit. Guam Local Rule 17.1(e) says that any document required or  
3 authorized to be served on counsel shall be served on associated local counsel (in this case,  
4 Thomas Sterling). Mr. Sterling was served with all documents which Gargrave filed with regard  
5 to its amended third-party complaint. In addition, courtesy copies were also served on  
6 Mr. Gibson in San Francisco (although he simply mailed them all back to counsel for Gargrave).<sup>1</sup>  
7 This service on Mr. Gibson was pursuant to Federal Rule of Civil Procedure 5(b)(1) which states  
8 that service shall be made on the attorney for a party, when a party is represented by an attorney.  
9 Gargrave was aware that Messrs. Sterling and Gibson represent Navigators, because of  
10 Mr. Sterling's two motions for the court to admit Mr. Gibson and his associate *pro hac vice*, his  
11 motion to dismiss Inchcape's Complaint in Intervention, and innumerable conversations between  
12 counsel and exchanges of emails. Booth Declaration, ¶¶ 3-9 and Exs. A-D. Therefore  
13 Rule 5(b)(1) **required** Gargrave to serve Mr. Gibson as counsel for Navigators.

14 Guam Local Rule 19.1(c) provides a method whereby an attorney can withdraw from a  
15 case; neither Mr. Gibson nor Mr. Sterling has filed such a motion in this matter. Furthermore,  
16 withdrawal requires leave of Court, which has not been given. Therefore these attorneys are still  
17 Navigators' lawyers in this case.

18 Navigators' assertion that Mr. Gibson was "not authorized to accept service of lawsuits on  
19 behalf of Navigators ...", Gibson Declaration, Ex. C, is a total red herring, as well as being  
20 incorrect. Status as an attorney for a party is conferred by appearing in a lawsuit, filing motions,  
21 pleadings, and so forth. Once an attorney makes such a general appearance, the mandatory  
22 service procedures of Federal Rule of Civil Procedure 5(b) are triggered, along with those of  
23 Guam Local Rule 17.1(e). Even if Navigators had specifically instructed Messrs. Gibson and  
24 Sterling that they were not authorized to accept service of process (which Gargrave sincerely  
25

26 <sup>1</sup> See Declaration of Stanley L. Gibson in Support of Specially-Appearing Defendant  
27 Navigators Insurance Company's Motion to Set Aside Default and Dismiss First Amended Third-  
28 Party Complaint of S.J. Gargrave Syndicate 2724 ("Gibson Declaration"), Ex. C (letter from  
Mr. Gibson's associate mailing back to counsel for Gargrave all service copies of pleadings and  
supporting documents).

doubts), such instructions from the client would be trumped by the Federal Rules and Local Rules of this Court.

Navigators would have it both ways. Navigators kept its local counsel Mr. Sterling, and its mainland counsel Mr. Gibson, in place in the Guam action, since the two dismissals of claims against Navigators had both been without prejudice, and were interlocutory. Since there were ongoing discussions by other parties of suing Navigators, and of the filing of new claims against Navigators by parties which had previously sued it, Navigators wisely did not either attempt to reduce the interlocutory dismissals to final judgments, or ask that the admissions of its attorneys be reversed. Now, however, when exactly that contemplated action has occurred (Gargrave has again sued Navigators), Navigators attempts to distance itself from its Guam and San Francisco lawyers. The Court should not countenance this chicanery.

#### IV. NAVIGATORS HAS FAILED TO SHOW THE REQUISITE "GOOD CAUSE" TO SET ASIDE THE ENTRY OF DEFAULT.

Navigators must show "good cause" for the Court to set aside the entry of default. FRCP 55(c); *Franchise Holding II, LLC v. Huntington Restaurants Group*, 375 F. 3d 922, 925 (9th Cir. 2004). Because FRCP 55(c) does not define "good cause," the courts generally rely on the same factors they use to evaluate a motion to vacate a default judgment. *Id.*; Annotation, *What Constitutes "Good Cause" ... Under Rule 55(c) ...* 29 ALR Fed. 7, 14 (1976 & Supp. 2006) (most courts recognize that the "good cause" standard exclusively governs relief from default entries).

In deciding whether a defendant has shown "good cause" for setting aside a default, the court should consider whether the defendant has prima facie meritorious defense. *Franchise Holding, supra*, @ 926. Here, Navigators asserts no defense on the merits. The sole grounds asserted by Navigators to set aside the default is the alleged (and incorrect) lack of proper service, a procedural defense. As discussed above, this defense lacks merit.

Another factor the courts will consider in deciding whether there is "good cause" to set aside a default is whether the default was willful. *Franchise Holding, supra* @ 926. A default should not be set aside if it was willful. *Brien v. Kullman Industries*, 71 F. 3d 1073, 1078 (2nd Cir. 1995). As demonstrated herein, Navigators sat silently by, wide eyed and notified, with full

1 knowledge of Gargrave's actions against it and willfully chose to do nothing, ostensibly because  
2 it misunderstood Rule 54(b). Such willful neglect is not "good cause" to set aside a default taken  
3 right under Navigators' nose.

4  
5 **V. NAVIGATORS' TACTICS CONSTITUTE WAIVERS AND FORFEITURES**

6 Navigators' Motion to Set Aside Default should be denied because Navigators has waived  
7 its objections to Gargrave's amended third-party complaint and forfeited any rights it might have  
8 had. On November 14, 2007, Gargrave filed a motion for leave to file its amended third-party  
9 complaint against Navigators. A copy of the draft third-party complaint was sent by counsel for  
10 Gargrave Ryan Donlon to counsel for Navigators. *See* the Declaration of Forrest Booth in  
11 Opposition to Navigators Insurance Co.'s Motion to Set Aside Default (hereinafter the "Booth  
12 Declaration"), ¶ 3 and Ex. A. Counsel for Navigators responded by email, arguing Navigators'  
13 case and stating that he was not authorized to accept service (although he did not claim he was  
14 not counsel of record for Navigators). Booth Declaration, Ex. A. Mr. Gibson repeated that  
15 assertion and made those same arguments for Navigators on November 21, 2007. Booth  
16 Declaration, Ex. B. On the same date, by return email, counsel for Gargrave specifically advised  
17 Mr. Gibson of the last date for Navigators to oppose Gargrave's motion. *Id.* Navigators, despite  
18 having counsel in both Guam and San Francisco, who were admitted and had previously appeared  
19 in this lawsuit, failed to appear in Court or object to Gargrave's motion. Accordingly, the motion  
20 was granted and the third party complaint was filed.

21 Gargrave served its first amended third-party complaint on Navigators on November 30,  
22 2007, by personally serving Navigators' Guam attorney Thomas Sterling, pursuant to and as  
23 required by Guam L.R. 17.1(e), and by mail service on attorney Stanley Gibson in San Francisco.  
24 Again, Navigators filed nothing with the Court objecting to either the filing of the first amended  
25 third-party complaint, or the nature and manner of service. Mr. Gibson did object by email and  
26 reargued Navigators' legal position, however. Booth Declaration, ¶ C.

27 After Navigators' time to answer had expired and an additional three weeks had passed,  
28 Gargrave filed a request for the clerk's entry of default on January 23, 2008. Again, both Thomas



1 Sterling and Stanley Gibson were duly notified and yet again neither Navigators' Guam counsel  
2 nor its San Francisco counsel filed any objection to the request (although another emailed protest,  
3 statement of Navigators' legal position and threat of Rule 11 sanctions was received by  
4 Gargrave's counsel on January 26, 2008. Booth Declaration, Ex. D). Accordingly, with no  
5 objection or answer filed, the clerk entered Navigators' default on January 29, 2008.

6 On numerous occasions, counsel for Gargrave has discussed Gargrave's claims against  
7 Navigators, various related legal issues and service of the amended third-party complaint, with  
8 Mr. Gibson. Booth Declaration, ¶ 9. These conversations occurred in one-to-one telephone calls,  
9 conference calls, in person and over lunch. *Id.*, ¶¶ 8-9.

10 Waiver is the intentional relinquishment of a known right or privilege. *Johnson v. Zerbst*,  
11 304 U.S. 458, 464 (1938). Through its attorneys of record, Navigators was aware of and knew it  
12 had the legal right to oppose Gargrave's motion for leave to file the amended third-party  
13 complaint; it was aware of and knew the service of the amended third-party complaint on its two  
14 sets of lawyers; it was aware of Gargrave's request for the entry of a clerk's default; and it was  
15 aware of and knew it had the legal right to either object to the entry of the clerk's default or file  
16 an answer or other response. Neither set of lawyers for Navigators filed *anything* on any of those  
17 four occasions, thereby knowingly and intentionally waiving Navigators' rights. At this late date,  
18 Navigators has forfeited any objections and should not be heard to complain, after the Court has  
19 properly approved valid requests which Gargrave placed before it. *U.S. v. Olano*, 507 U.S. 725,  
20 733 (1993) (right forfeited if not timely asserted).


21 **VI. THE COURT SHOULD NOT DISMISS THE AMENDED THIRD-PARTY**  
22 **COMPLAINT ON ACCOUNT OF SERVICE ISSUES**

23 In its prayer for relief, Navigators has requested that the Court dismiss Gargrave's  
24 "Complaint [sic]" against Navigators because of "ineffective service of process". Navigators'  
25 Motion to Set Aside Default, p. 4, ll. 15-17. Navigators gives no authority for this request, and  
26 none exists. A complaint (or third-party complaint) cannot be dismissed on the merits because of  
27 problems with service of process, even if there were any (which Gargrave denies).  
28

1           **VII. CONCLUSION**

2           Navigators (1) chose to ignore Gargrave's request for leave to file an amended third-party  
3 complaint; (2) chose to ignore the filing of the amended third-party complaint; (3) chose to ignore  
4 the time provided to answer the amended third-party complaint; (4) chose to ignore the request  
5 for a clerk's default; and (5) did all of these things voluntarily and knowingly. Navigators' local  
6 attorneys in Guam, and *pro hac vice* counsel in San Francisco, were properly served with all  
7 relevant papers, at each step of the process. Also, counsel for Gargrave repeatedly discussed the  
8 matter with Mr. Gibson. Navigators was content to allow a default to be taken; these acts and  
9 decisions were waivers or forfeitures by a large, sophisticated New York insurance company,  
10 represented by experienced and capable lawyers. Navigators knew and expected that when it did  
11 nothing, a default would result. Navigators' belated and baseless motion to now set aside the  
12 default must be denied. This gamesmanship should not be allowed. Gargrave respectfully  
13 requests that its Motion for Default Judgment should be granted.

14           Dated this 11th day of February, 2008.

15  
16  
17 

18           THOMAS McKEE TARPLEY  
19           Attorney for Defendant, Cross-Claimant  
20           and Counterclaimant S. J. GARGRAVE  
21           SYNDICATE 2724  
22  
23  
24  
25  
26  
27  
28



**CERTIFICATE OF SERVICE**

I, Dorothea Quichocho, hereby certify pursuant to Rule 5(d) Fed. R. Civ. P. that on February 11, 2008, I caused to be served a true and correct copy of the S.J.

**GARGRAVE SYNDICATE 2724'S OPPOSITION TO NAVIGATORS' MOTION TO SET  
ASIDE DEFAULT AND DISMISS FIRST AMENDED THIRD-PARTY COMPLAINT  
AND REPLY BRIEF IN SUPPORT OF MOTION FOR DEFAULT JUDGMENT  
AGAINST NAVIGATORS INSURANCE CO., DBA NAVIGATORS PROTECTION &  
INDEMNITY to the following:**

Mike W. Schwab, Esq.  
OFFICE OF THE U.S. ATTORNEY  
108 Hernan Cortez Avenue, Suite 500  
Hagatna, Guam 96910

R. Michael Underhill  
Attorney in Charge, West Coast Office  
MIMI MOON  
Trial Attorney  
Torts Branch, Civil Division  
U.S. DEPARTMENT OF JUSTICE  
450 Golden Gate Avenue, Room 7-5395  
P.O. Box 36028  
San Francisco, CA 94102-3463  
[Courtesy copy]

*Attorneys for Plaintiff and Counterdefendant United States of America*

Lawrence J. Teker, Esq.  
TEKER TORRES & TEKER, P.C.  
Suite 2-A, 130 Aspinall Avenue  
Hagatna 96910-5018, Guam

John E.D. Powell, Esq.  
CAIRNCROSS & HEMPELMANN, P.S.  
524 Second Avenue, Suite 500  
Seattle, WA 98104-2323  
[Courtesy copy]

*Attorneys for Defendants and Cross-Defendants Marwan Shipping & Trading Co.;  
Five Seas Shipping Co., LLC; and Al-Buhaira National Insurance Company*

Thomas C. Sterling, Esq.  
BLAIR STERLING JOHNSON MARTINEZ &  
LEON GUERRERO, P.C.  
Suite 1008, DNA Building  
238 Archbishop F.C. Flores Street  
Hagatna, Guam 96910-5205

Stanley L. Gibson, Esq.  
GIBSON ROBB & LINDH LLP  
100 First Street, 27th Floor  
San Francisco, CA 94105  
[Courtesy copy]

*Attorneys for Defendant Navigators Insurance Co., dba  
Navigators Protection & Indemnity*

1 David P. Ledger, Esq.  
2 Elyze J. McDonald, Esq.  
3 CARLSMITH BALL LLP  
4 Bank of Hawaii Building, Suite 401  
5 134 West Soledad Avenue  
6 Hagatna, Guam 96910

*Attorneys for Third Party Defendant Inchcape Shipping Services Guam LLC*

7  
8 Dated this 11<sup>th</sup> day of February, 2008.

9   
10 DOROTHEA QUICHOCHO  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28